

Internal Revenue Service  
**memorandum**

CC:TL-N-9723-87

TS:BHEARD

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to: Regional Counsel, Midwest Region CC:MW  
ATTN: William Bogner, Special Trial Attorney

from: Acting Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This responds to your request for technical advice of August 3, 1987.

Issue

1. Whether, based upon a non-TEFRA statutory notice of deficiency, the Tax Court has jurisdiction to redetermine that part of a net operating loss (NOL) carryback which is attributable to TEFRA partnership items.
2. Whether the suspension of the statute of limitations for assessment provided by I.R.C. § 6229(d) is applicable to a net operating loss (NOL) carryback from a TEFRA partnership.

CONCLUSION

1. Since the statutory notice upon which the present case is based is not an "affected item statutory notice" issued following and pursuant to a TEFRA proceeding, the Court does not have jurisdiction to redetermine the part of the NOL carryback attributable to [REDACTED] TEFRA partnership items. Thus, the parties should assume that the amount of the NOL carryback which is reported consistently with the partnership K-1 (or which has been adjusted in a prior TEFRA partnership proceeding) is correct. The loss carried back to [REDACTED] and [REDACTED] attributable to TEFRA partnership items in [REDACTED] is an "affected item", and thus, can be adjusted following a proceeding at the partnership level through a "computational adjustment" 1/ or, if additional partner level

1/ A "computational adjustment" is merely a recalculation of a partner's tax liability which properly reflects adjustments at the partnership level. I.R.C. § 6231(a)(6).

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determinations are needed, 2/ through an affected item statutory notice. N.C.F. Energy Partners v. Commissioner, 89 T.C. No. 51 (Oct. 5, 1987).

Since the taxpayer has raised as an issue in his petition the amount of his NOL which is attributable to TEFRA partnership items, a motion to strike this issue for lack of jurisdiction should be filed. N.C.F. Energy Partners v. Commissioner, supra; Maxwell v. Commissioner, 87 T.C. 783 (1986).

2. The period of limitations for assessing a deficiency pertaining to the portion of an NOL carryback that is attributable to TEFRA partnership items is extended pursuant to I.R.C. § 6229(d), since the NOL carryback at issue is an affected item.

#### Facts

After a taxpayer took into account pass-through losses from a TEFRA partnership in [REDACTED] he had a net operating loss (NOL) which he carried back to his tax years [REDACTED] and [REDACTED]. After receiving statutory notices with respect to [REDACTED] and [REDACTED] the taxpayer filed a petition for a redetermination of the amount of the NOL attributable to the [REDACTED] partnership year and the amount of the allowable carryback. A TEFRA partnership proceeding is currently underway with respect to the [REDACTED] partnership year.

#### Discussion

For partnership years beginning after September 3, 1982, the tax treatment of a partnership item must be determined at the partnership level under the provisions of I.R.C. §§ 6221-6233 (TEFRA) except as provided in those sections. 3/ Thus, the Court in the present case neither has jurisdiction over TEFRA partnership items nor has jurisdiction over the taxpayer's NOL carryback to the extent the NOL is comprised of TEFRA partnership items.

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2/ For instance, the amount of a partner's at risk amount might have to be determined separately at the partner level in order to calculate the amount of allowable flow through deductions. In that situation, an affected item statutory notice would have to be sent before assessment. I.R.C. § 6230(a)(2).

3/ The TEFRA provisions do not apply to small partnerships as defined under I.R.C. § 6231(a)(1)(B) or to items which become nonpartnership items under section 6231(b). These provisions do not appear to be applicable here.

The portion of the NOL carryback that is attributable to deductions flowing from a TEFRA partnership is an "affected item" because it is "affected by a partnership item", I.R.C. § 6231(a)(5), i.e., it is affected by the adjustments at the partnership level. See Maxwell v. Commissioner, 87 T.C. at 790 (carryback of investment tax credit derived from partnership items defined to be an "affected item"). Since the tax treatment of affected items depends on partnership-level determinations, affected items cannot be tried as part of a partner's personal tax case until the completion of the partnership-level proceeding. Id. at 792; N.C.F. Energy Partners v. Commissioner, supra.

There are two types of affected items which require different procedural treatment following a partnership proceeding. N.C.F. Energy Partners v. Commissioner, supra.

If the application of the partnership-level determinations to a partner is merely computational, the change in the tax liability of the partner to properly reflect the treatment of the partnership items is made through a "computational adjustment" (i.e., the change in the partner's tax liability is computed and directly assessed). I.R.C. § 6231(a)(6); Temp. Treas. Reg. § 301.6231(a)(6)-1T; N.C.F. Energy Partners v. Commissioner, supra; Maxwell v. Commissioner, supra.

However, if a change in a partner's tax liability cannot be made without making one or more partner-level determinations (such as his outside basis or at risk amount), then an affected item statutory notice would be issued with respect to these items. I.R.C. § 6230(a)(2)(A)(i); Temp. Treas. Reg. § 301.6231(a)(6)-1T. Only partner-level determinations (i.e., the outside basis/at risk amount) <sup>4/</sup> can be litigated under such an affected item statutory notice; the tax treatment or allocation of partnership items may not be placed at issue.

Since the statutory notice upon which the present case is based is not an "affected item statutory notice", and was not issued following and pursuant to a TEFRA proceeding, the Court does not have jurisdiction to redetermine any part of the NOL carryback attributable to the 1983 TEFRA partnership items.

4/ Penalties are another example of "affected items". Maxwell v. Commissioner, supra.

Statute of Limitations Issue

Another issue is whether we need to do anything to protect the applicable statute of limitations. I.R.C. § 6501(h) provides that:

In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

A problem may arise where the limitations period for the taxpayer's nonpartnership items has expired but the period for assessing TEFRA partnership or affected items has not expired. Under the quoted language, an assessment must be made "before the expiration of the period within which a deficiency for the taxable year of the net operating loss . . . may be assessed." As written, section 6501(h) would have initially applied the non-TEFRA limitations period. The creation of a separate and distinct period of limitations under TEFRA was not contemplated by the statute. A common sense approach would dictate applying the separate TEFRA period of limitations for that portion of the [REDACTED] and [REDACTED] adjustments attributable, through the NOL carryback, to [REDACTED] TEFRA partnership adjustments. I.R.C. § 6229(a) supports this position as follows:

Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions). (Emphasis supplied).

The "shall not expire before" language should operate to extend any earlier period of limitations which might otherwise apply under section 6501(h). Furthermore, the period under section 6229(a) is suspended under section 6229(d) if a notice of final partnership administration adjustment (FPAA) is mailed to the tax matters partner, for the period during which an action may be brought under section 6226 (and, if an action with respect to such administrative adjustment is brought during such period, until the decision of the court in such action becomes final), and for 1 year thereafter. Thus, even if the period of limitations might otherwise expire with respect to the NOL carryback to [REDACTED] and [REDACTED] under section 6501(h), such period is kept open under sections 6229(a) and (d).

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